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No._____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,
Petitioners,

vs.

WILLIAM SAUNDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented for Review

In a 42 U.S.C. §1983 action based on a violation of the equal protection clause, where the plaintiff does *not* allege discrimination on the basis of race, religion or intent or inhibit or punish the exercise of constitutional rights, does the plaintiff have to prove, as part of his cause of action, that he was selectively treated based upon a malicious or bad faith intent to injure.

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 10, 1980. Motion for Rehearing denied September 26, 1980.

Reported Opinion

The Opinion of the Second Circuit Court of Appeals is reported at 627 F.2d 606 (2nd Cir. 1980).

Grounds for Jurisdiction

The judgment sought to be reviewed is a decision of the United States Court of Appeals for the Second Circuit, issued on July 10, 1980, and amended by an Order on Petition for Rehearing filed September 26, 1980. A petition for rehearing with a suggestion that the action be heard *en banc* was denied in an Order dated September 26, 1980.

This Court has jurisdiction to review the Judgment by a Writ of Certiorari under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes, Ordinances

Constitution of the United States of America

Amendment XIV

> . . . nor shall any State . . . deny to any person within its jurisdiction equal protection of the laws.

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprived of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Massachusetts General Laws; Chapter 94, Sections 13, 16C and 16D

These statutory provisions govern the issuance of regulations by the Massachusetts Milk Regulation Board, the inspection of dairy farms within and without the Commonwealth of Massachusetts, and the issuance of registration certificates. These lengthy provisions are set forth in the Appendix.

Milk Regulation Board Regulations for the Inspection of Dairy Farms Producing Milk for Distribution, Sale or Exchange in the Commonwealth

REGULATION 9

The water supply shall be easily accessible, adequate, and of a safe, sanitary quality.

Explanation of the Regulations for the Inspection of Dairy Farms Producing Milk for Distribution, Sale or Exchange in the Commonwealth

REGULATION 9.—WATER SUPPLY.—THE WATER SUPPLY SHALL BE EASILY ACCESSIBLIE, ADEQUATE, AND OF A SAFE, SANITARY QUALITY.

Explanation. . . . private supplies shall be properly covered over and protected from all possible sources of contamination.

Statement of the Case

This Writ is sought to review the July 10, 1980 decision of the United States Court of Appeals for the Second Circuit, reversing a judgment of the United States District Court for the District of Vermont in an action brought under 42 U.S.C. §1983. Following two jury trials, the Honorable Albert W. Coffrin presiding, the second trial being solely on the issue of damages, judgment was entered for the Plaintiff in the amount of $39,375.00.

This is a suit brought by petitioners Harmasse and Elizabeth LeClair, dairy farmers in Charlotte, Vermont, under 42 U.S.C. §1983, for damages arising out of the revocation of their license to ship milk into the Commonwealth of Massachusetts by William Saunders, a milk inspector. Mr. Saunders' duties included annual inspection of the LeClairs' farm for compliance with Massachusetts licensing regulation standards. The suit was filed on April 22, 1976, invoking jurisdiction under 28 U.S.C. §1343(e). It was tried on June 20 through 22, 1978, before a jury which found, in response to interrogatories, that the Defendant William Saunders intentionally and purposefully discriminated against the Plaintiffs, causing them to be suspended from shipping their milk into the Commonwealth of Massachusetts, resulting in $44,152.00 in damages. On January 22, 1979, Judge Coffrin set aside the verdict as excessive, and ordered a new trial solely on the issue of damages. A jury trial was had on the damages issue on July 25, 1979, resulting in a verdict of $39,375.00. All post trial motions were denied, and Defendant filed a timely notice of appeal to the Second Circuit Court of Appeals, whose judgment is sought to be reviewed by this Writ.

The Court of Appeals, finding the case to be "lodged in a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply", held that liability depended upon proof that:

> (1) the person, compared with others similarly situated, was selectively treated; and
>
> (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, *or malicious or bad faith intent to injure a person.* 627 F.2d at 609, 610. [Emphasis added].

The Court then went on to hold that the evidence at trial did not support a finding of malice, since this standard must be "scrupulously met". The Court noted the *Oyler v. Boles*[1] rule that some selectivity in enforcement is not in itself a denial of equal protection. In its Order on Petition for Rehearing, the Court quoted Judge Skelly Wright:

> The key here is that the equal protection clause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case invoking the equal protection clause, if it is to succeed, must allege something more than a tort, personal to the plaintiff. Wright, J., *Judicial Review and the Equal Protection Clause,* 15 Harv. C. R. - C.L. L. Rev. 1, 27 (1980).

The facts of this case, taken in the light most favorable to the Petitioners, are as follows.

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[1] 368 U.S. 447, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962).

The LeClairs own and, until the events which gave rise to this litigation, operated a dairy farm in Charlotte, Vermont. In order to sell their milk to their regular outlet (and, as a practical matter, to market their milk anywhere in Vermont) they needed a license to ship milk into the Commonwealth of Massachusetts.[2] The Massachusetts Department of Agriculture has set up a farm inspection system, and out-of-state farms such as the LeClairs' have to pass an annual inspection to determine compliance with the Massachusetts regulations to obtain or retain a license. Defendant/Respondent William Saunders was an inspector employed by the Massachusetts Department of Agriculture.[3]

The regulations set standards which concern cleanliness, sanitation and disease prevention.[4] One of the regulations provides that the water supply shall be "easily accessible, adequate, and of a safe, sanitary quality". This regulation concerns the water supply to the milk room, which may be used for washing hands, tools, utensils and the bulk milk tank.

Vermont farmers in many areas of the state have a history of difficulty finding adequate water supplies. Thus, over the years, the Massachusetts Department of Agriculture, through its milk inspectors, had an unwritten policy or custom of not excluding farmers for unsatisfactory water supplies, but rather working with the farmers and municipalities to develop better supplies.

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[2] Vermont is a part of the so-called Boston milkshed. Vermont milk which is shipped to Massachusetts for sale, or even milk that is mixed with milk for sale to Massachusetts or trucked in a milk truck that at other times carries milk for sale to Massachusetts, must come from farms licensed by the Commonwealth of Massachusetts.

[3] Inspectors such as Saunders are commonly called "milk inspectors" although they inspect farms, not milk.

[4] Petitioners do not challenge the validity of these regulations.

When this lawsuit arose, there were approximately 12 farms in Saunders' inspection territory which still had unsatisfactory water supplies.

One of these farms was the LeClairs'. The LeClairs had to truck in water to a cistern in the house for the heating system. And, they brought in water from town in five gallon jugs, or boiled the cistern water for drinking. There was an old well on the property, but it gave little water.[5] The LeClairs' water supply for the milk room was a large open pond which was piped to the milk room and then run through a chlorinator. The pond had been dug by the U.S. Department of Agriculture in 1946 to supply water for the farm uses. Nevertheless, the open pond supply of water was not deemed satisfactory, since it was not "protected".[6]

The events that gave rise to this lawsuit began in April 1975, when Saunders inspected the LeClair farm. On his inspection report, Saunders indicated that, along with some minor matters, LeClair should "provide a protected water supply for milkroom use". He further indicated that the farm was not approved and that he would "reinspect after one month". This request to provide a protected water supply was not new. Saunders had been making it off and on since 1971. However, LeClair, like other farmers with unprotected supplies, and in accordance with policy, had not been excluded. LeClair was present at the time of this inspection, and, when the well was suggested as a possible source, indicated to Saunders that the well was not functional or usable.

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[5] Testimony at trial also described the difficulties neighbors had experienced trying to obtain water.

[6] The LeClairs had not experienced any problems with the condition of their milk. In 1973 and 1974, they received silver certificates for high quality milk from their creamery. And, the LeClairs were always approved for the Vermont milk market.

Saunders reappeared for reinspection on December 23, 1975 (seven days before the end of the year when the LeClairs had to be approved), rather than the one month later indicated on the April inspection report.

On the morning of the inspection, between 10 and 11 o'clock, Saunders had visited the Blaisdell farm in a neighboring town. Blaisdell came upon Saunders after Saunders had already made out the inspection form. Saunders had noted some items to be cleaned up, and marked the form "reinspect in seven days". He then mentioned to Blaisdell "something about stinking", and Blaisdell retorted that the farm couldn't be too bad because three days previously he had gotten a 96 score (from the H.P. Hood Company inspector). At that, Saunders "blew mad" and told Blaisdell that until he and Hood stopped playing the numbers game he didn't intend to reinspect Blaisdell for Massachusetts. He further said that the place had been a show place but was nothing but a mess now. He then crossed out the "reinspect" and wrote down "exclude", indicating that the farm would not be approved without a protected water supply.[7] Because of the efforts of his cooperative, Blaisdell was promptly reinspected and reinstated by Saunders, without any change in his water supply.

Saunders, who had left the Blaisdell farm in an angry mood, arrived at the LeClair farm around 1:55 p.m. LeClairs were not there, and Saunders left an inspection report saying that the farm was excluded. He indicated that the LeClairs should:

> Provide a protected safe water supply for milkroom use. No further delays allowed on this problem. So indicate with state water Cert[ificate].

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[7] Blaisdell was one of the other farms with an unprotected source of water.

This was followed by a letter suspending the LeClairs as of January 14, 1976. Saunders testified that the unsatisfactory water supply was the reason for exclusion.

LeClairs, now unable to sell their milk, immediately contacted the Vermont milk inspector to obtain a state water certificate, per Saunders' instruction. Four tests were performed, and after adjustments were made to the LeClairs' chlorinator, the fourth test resulted in the issuance of a Vermont water certificate on February 19, 1976.

The LeClairs' attorney then wrote to Saunders indicating the disastrous consequences attending the LeClairs' exclusion, stating that the LeClairs had not been treated like other farmers in similar circumstances, and requesting an immediate reinspection. The reinspection occurred on March 12, 1976, and the farm was "not approved". Saunders testified that he did not give LeClair one inch in the inspection, despite his usual lenient attitude, and that he was "thorough, right to the point". He cited the reasons for his thoroughness as receiving the letter from the LeClairs' counsel "telling me that I was a liar", and the build-up on the case. Among the conditions that were to be corrected was cleaning flyspecks off the lightbulbs. And, a majority of the conditions noted were unchanged from the December inspection, when no mention had been made of them. In a follow-up letter, the LeClairs were instructed to pipe water from the well (which Saunders knew to be unsuitable) into the milk room, at a time of year when the ground was frozen and pipe could not be laid.

The LeClairs, excluded from the Massachusetts Milk market, sought other markets for their milk. They contacted several dairies, which indicated that they could

not take the LeClairs' milk without a Massachusetts license. Finally, in July, the LeClairs made an arrangement to sell to a cheese company, but when this arrangement ended, they were effectively out of business. Until the present day, LeClairs have not been able to find another market for their milk, and have lived on income from the sale of their cows.

The following evidence provides a circumstantial basis for a finding of intentional and purposeful discrimination:

1. LeClair was excluded at a time when other farmers with similar water supplies were not excluded, in contravention to the Dept. of Agriculture policy.

2. Blaisdell, who was excluded in a fit of temper on the same day as LeClair, was promptly reinstated without any change in his water supply.

3. Saunders knew the well was dry but kept insisting that it be hooked up.

4. Saunders claimed no justification for singling LeClair out, other than insisting that LeClair had a well, and admitted that he did not know how much water was in the well.

5. Saunders testified that it was this "discovery" of the well on LeClair's farm that precipitated the exclusion, and denied previous knowledge of the well. Yet, he had noted the well on an earlier inspection report.

6. Saunders was in an angry mood on the day of the exclusion.

7. Saunders was subject to fits of temper, both as testified to, and as evident from his demeanor on the witness stand.

8. Saunders admittedly had an unusually strict attitude at the March reinspection, for reasons that bore no relation to the fitness of LeClairs' farm.

The jury specifically found that Saunders intentionally and purposefully discriminated against the LeClairs.[8] And, the trial judge denied Saunders' Motion for a New Trial wherein he had maintained that there was no support for a finding of malice. The Court of Appeals, however, disagreed, and held, as previously explained, that the LeClairs had to demonstrate malicious or bad faith intent to injure in order to recover.

Argument

The Supreme Court should grant this writ because the Second Circuit Court of Appeals has decided an important issue of constitutional law in a way that conflicts with law in this Court and in another circuit. Furthermore, because of recent developments in the Court's decisions, the standard set forth in *Snowden v. Hughes,* 321 U.S. 1, 88 L.Ed. 497, 64 S.Ct. 397 (1944); *reh. den.,* 321 U.S. 804, 88 L.Ed. 1090, 64 S.Ct. 778 (1944), should be reviewed. The question, as formulated above, is whether the LeClairs must prove malicious intent to injure to state a cause of action.

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886) is the seminal decision from which the LeClairs derive a cause of action under the equal protection clause for discriminatory application of an otherwise valid law. *Yick Wo,* of course, involved licenses to operate laundries which were denied solely to Chinese applicants. The case inspired the famous rule that:

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[8] See Jury Interrogatories in the Appendix.

> Though the law itself may be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. 6 S.Ct. at 1073.

This protection was applied to persons not claiming racial or class-based discrimination in this Court's decision in *Snowden v. Hughes, supra.* There, the Court held that in a §1983 and §1987 action for damages, the plaintiff must prove intentional or purposeful discrimination to make out a violation of the equal protection clause.

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. 321 U.S. at 8.

Snowden, of course, involved a candidate complaining that his exclusion from the ballot, contrary to state law, was a violation of, among other things, the equal protection clause.

The Court expounded once more on the subject, in a criminal context, in *Oyler v. Boles,* 368 U.S. 447, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962), a case where a defendant charged under an habitual criminal statute alleged selective enforcement. The Court held that the failure to prosecute others because of lack of knowledge of their prior offenses did not constitute a violation of defendant's rights, and then went on to say:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case

> might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of equal protection were not alleged. 368 U.S. at 456.

Yick Wo and *Snowden* were cited in support of this language, thus raising the question of whether the same standard is meant to be applied in all selective treatment cases or whether the standard varies with the type of case.

These three cases are the authority to which the federal courts of appeal have looked for guidance in equal protection cases involving discriminatory application of state law. However, there has been a split among the Circuits on the showing that is required to make out a denial of equal protection. Although the courts tend to all proceed under the rubric of "intentional and purposeful discrimination", the proof required to meet the standard varies widely. Some courts, like the Second Circuit in this case, require proof of malicious intent to injure. Other courts, however, have found a cause of action even where the defendant acted in good faith (Seventh Circuit) or where defendants' conduct could only be characterized as "arbitrary thoughtlessness" (Fifth Circuit). No particular distinction has been made between plaintiffs who have committed criminal violations, those who claim the benefits of state laws, and those (like the LeClairs) who are not in compliance with licensing regulations.

The Second Circuit is one of the Courts which have adhered to a strict requirement of malicious intent to injure. This requirement was formulated as a two part test in *United States v. Berrios*, 501 F.2d 1207 (1974). *Berrios*

involved criminal defendants charged with holding union office within five years after conviction for a felony and knowingly permitting a person to hold union office after such conviction. They challenged their conviction on equal protection grounds, and the Court held that each would have had to prove:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
>
> (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. 501 F.2d at 1211.

In the case at bar, the Court cited this standard, and, noting that it was drawing upon *Berrios* as well as the immunity inquiry "outlined in *Wood* [*v. Strickland*]"[9], formulated the following test:

> (1) the person, compared with others similarly situated, was selectively treated; and
>
> (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. 627 F.2d at 609.

The *Berrios* test has been followed by the Fifth Circuit Court of Appeals in *United States v. Johnson*, 477 F.2d 1304 (5th Cir. 1978) (criminal defendant charged with willful failure to file an income tax return) and the Eighth Circuit in *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979) (criminal defendant charged with aiding and abetting willful filing of fraudulent withholding forms by others).

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[9] 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975).

The requirement of actual malice or intent to harm has also been incorporated into decisions of the First Circuit in civil matters. In *Ortega Cabrera v. Municipality of Bayamon,* 562 F.2d 91 (1st Cir. 1977), the owner of land adjacent to a municipal dump brought an action against the former mayor for unlawfully establishing a dump causing plaintiff to suffer damage from the nuisance, and against the current mayor for failure to take steps to prevent continuation of the harm. The Court found no cause of action for a denial of equal protection, stating:

> Here there has been no showing of the kind of purposeful, malicious action which is a prerequisite to any such damages recovery. There is no evidence that defendants harbored any ill will toward plaintiff, either as individuals or as members of any class of persons, much less that defendants acted with the specific intent of harming them. 562 F.2d at 103.

A similar requirement was met in *Cordeco Development Corp. v. Santiago Vasquez,* 539 F.2d 256 (1st Cir. 1976), *cert. den.* 429 U.S. 978 (1976), where plaintiffs alleged the denial of a sand extraction permit was for illegitimate political or personal motives. *Accord, Friedlander v. Cimino,* 520 F.2d 318 (2nd Cir. 1975) (suit for discriminatory enforcement of licensing and performance test requirements against non-physician clinic laboratory directors and favoring physician directors).

The Tenth Circuit also requires actual malice to prove a violation of equal protection rights. Thus, in *Cook v. City of Price, Carbon County, Utah,* 566 F.2d 699 (10th Cir. 1977), the Court held discriminatory enforcement of a zoning ordinance acceptable where there was selective enforcement without malicious intent. The Court noted that selective enforcement was constitutional where a test case is needed to clarify a doubtful law or to prosecute particularly egregious violations and thereby deter other violators. 566 F.2d at 701.

On the other hand, the Seventh Circuit has a line of cases in which actual malice or intent to injure are not deemed a necessary element of the plaintiff's burden in an equal protection case. *Weisberg v. Powell,* 417 F.2d 388 (7th Cir. 1969), involved a defendant who, as Secretary of the State Election Board, admitted that he placed persons at the head of the ballot whom he felt had more experience in government. The Court held that the sincerity of the Secretary's belief notwithstanding, such action was intentional and discriminatory under *Snowden v. Hughes,* 417 F.2d at 392. And, in *United States v. Falk,* 479 F.2d 616 (7th Cir. 1977) (*en banc*), the Court held that a criminal defendant who was prosecuted for violation of the draft card possession laws stated a claim for violation of his equal protection rights. Contrary to the *Johnson, Moss,* and *Cook* cases cited above, the Court held that a government policy not to prosecute violations of the draft card possession statute, the defendant's status as an active and vocal dissenter to the draft, the unusual heirachy of Justice Department officials involved in the decision to prosecute, and the untimely delay in instituting prosecution made out a *prima facie* case of improper discrimination in enforcing the law. 479 F.2d at 623. At that point, the burden of proof switched to the prosecution for proof of non-discrimination. 479 F.2d at 624.

The Seventh Circuit also held that *arbitrary* discrimination was sufficient to make out a violation of equal protection rights. Thus, in *Olshock v. Village of Skokie,* 541 F.2d 1254 (7th Cir. 1976), the Court held that an arbitrary decision to suspend police officers who had violated police department rules and regulations who did not employ counsel, but to discharge those who had counsel, was a violation of equal protection. *Accord, Sangmeister v. Woodard,* 565 F.2d 460 (7th Cir. 1977)

(systematic placement of names of candidates who were in the same political party as county clerk at the head of the ballot was intentional and purposeful discrimination).

The Fifth Circuit has also departed from the strict requirement of malicious intent to injure. *Hawkins v. Town of Shaw, Mississippi,* 461 F.2d 1171 (5th Cir. 1972) involved defendants' failure to provide municipal services on an equal basis. The Court reflected:

> In judging human conduct, intent, motive and purpose are elusive subjective concepts, and their existence usually can be inferred only from proven facts. As stated in the original opinion, the record before us does not contain direct evidence which establishes bad faith, ill will or any evil motive on the part of the town of Shaw and its public officials. However, the record proof does clearly establish conduct which cannot be judicially approved.
>
> In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for " 'equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; . . ." we now firmly recognize that the *arbitrary quality of thoughtlessness* can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme. [Emphasis supplied.] 461 F.2d at 1172-3.

Thus, the standard applied to the LeClairs' case would have varied, depending on which Circuit they were in. Furthermore, the Court of Appeals in the case at bar not only held that the plaintiffs had to meet the strict requirement of malicious intent to injure, but also found that this requirement had to be "scrupulously met". This language implies that the Court used a higher standard of proof than normally present. Especially in a case such

as this one where malice would never be admitted, but must be proven circumstantially, this places a burden on the plantiff that is virtually impossible to meet, and one much more onerous than that which would seem to be encompassed by the words "intentional or purposeful discrimination" found in *Snowden.* The Court of Appeals decision is therefore very probably in conflict with this Court's decision in *Snowden.*

Also, the *Snowden* test, as interpreted by the Court of Appeals, contains a much stricter requirement of proof for a cause of action that this Court has required to avoid the qualified immunity defense of a state official. Thus, in the first instance, the appropriateness of applying the *Snowden* standard of intentional or purposeful discrimination is itself questionable. *Snowden* was, of course, decided in 1944, and thus predated this court's recent work in formulating the extent of the defense in civil rights damages actions. *Wood v. Strickland,* 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975); *Gomez v. Toledo,* 62 L.Ed.2d 666 (1980). This defense now gives defendants the same type of protection formerly founded in the requirements for a *prima facie* case under the equal protection clause. Thus, this Court's recent decisions on the qualified immunity defense make desirable a review of the *Snowden v. Hughes* requirement of intentional or purposeful discrimination.

The *Snowden v. Hughes* standard, as interpreted by the Second Circuit and some other Courts of Appeal, conflicts with the scope of the qualified immunity. Thus, it would be possible that a plaintiff could be found to have no cause of action in a suit in which the defendant had acted in bad faith. Specifically, the qualified immunity defense fails if there is "objective" bad faith (*i.e.,* the defendant reasonably should have known that he was

violating the plaintiff's constitutional rights);[10] yet, where only "objective" bad faith is present, there is no cause of action for intentional and purposeful discrimination. The Court of Appeals decision is a case on point. The Court required actual malice for the maintenance of an action, and thus even if Saunders acted in objective bad faith under *Wood v. Strickland* standards, he would still obtain a dismissal.

There are myriad ways in such a case of trying to accommodate the cause of action and the qualified immunity defense, which are a tremendous source of confusion to litigants and the judiciary. Should the court, as the Second Circuit did, just forget about the objective bad faith avoidance of the defense, and adhere to the intentional discrimination standard, thus, expanding the defense in an equal protection case? Or, should the court interpret the *Snowden* standard to incorporate the qualified immunity defense, so that the cause of action is co-extensive with the defense? However, to the extent that the cause of action is co-extensive with the defense, the burden of pleading and proof are on the plaintiff, which is arguably contrary to this Court's decision in *Gomez v. Toledo, supra.* By granting certiorari here, this Court could clarify these vexing issues.

Review by this Court would thus save litigation time in similar cases. The rules prescribed in the Second Circuit decision would apply to a multitude of ordinary citizens' contacts with their government. Day care center licenses, nursing home licenses, optometrists' licenses, veterinarians' licenses, real estate and insurance brokers' licenses, liquor licenses, are but a few instances in which governmental sanction is needed to pursue an occupa-

[10] *Wood v. Strickland,* 420 U.S. at 322.

tion. The list is endless, as are the regulations which pertain to licensing standards. Given the multitude of regulations governing licenses, few licensees can boast that they meet the letter of the law. Thus, the power of licensing bureaucrat is awesome (determining whether a person can carry on his chosen occupation) and the restraints are few. It is thus a fertile field for civil rights litigation, especially with no autoritative standard to be applied. And, once a case is brought, the confusion resulting from trying to determine the elements of a cause of action and coordinate it with the qualified immunity defense is a fruitful source of motions and briefings. The Court of Appeals itself admitted that there were "surprisingly few cases and no clearly delineated rules" to guide it. Thus, clarification of the rules of law to apply in equal protection cases would promote an economy of judicial resources in dealing with these troublesome issues, involving questions both important and sure to recur.

Conclusion

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

LANGROCK SPERRY PARKER
& STAHL
By: PETER F. LANGROCK, ESQ.
A Member of the Firm
P.O. Drawer 351
Middlebury, Vermont 05753
(802) 388-6356

Counsel for Petitioners

Notice of Appearance

IN THE

SUPREME COURT OF THE UNITED STATES

No._____

October Term, 1980

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,
Petitioners,

v.

WILLIAM SAUNDERS,
Respondent.

NOW COMES, Peter F. Langrock, Esq. of the law firm of Langrock Sperry Parker and Stahl, and appears for the Petitioners, Harmasse LeClair and Elizabeth LeClair, in the above captioned matter.

DATED at Middlebury, County of Addison and State of Vermont, this 18th day of December, 1980.

LANGROCK SPERRY PARKER
& STAHL
By: PETER F. LANGROCK, ESQ.
P.O. Drawer 351
Middlebury, Vermont 05753
(802) 388-6356

Certificate of Service

I, Peter F. Langrock, Esq., a member of the firm of Langrock Sperry Parker and Stahl, P.O. Drawer 351, Middlebury, Vermont 05753, attorney for the Petitioners in the above entitled cause, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18 day of December, 1980, I served copies of the foregoing Petition for a Writ of Certiorari and all appendices attached thereto and my Notice of Appearance on William Saunders, by mailing three copies thereof, in a duly addressed envelope with first class postage pre-paid, to the attorney of record for said Respondent, Mitchell J. Sikora, Jr., Esq., Assistant Attorney General, Commonwealth of Massachusetts, 2019 McCormack Building, One Ashburton Place, Boston, Massachusetts 02108.

PETER F. LANGROCK, ESQ.
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APPENDIX

Opinion of the Second Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1070, 1098—September Term, 1979

(Argued April 25, 1980 Decided July 10, 1980)

Docket Nos. 79-7113, 79-7759

HARMASSE LECLAIR and ELIZABETH LECLAIR,

Appellees-Cross-Appellants,

v.

WILLIAM SAUNDERS,

Appellant-Cross-Appellee.

Before:

KAUFMAN, *Chief Judge,* OAKES, *Circuit Judge,* and TENNEY, *District Judge.**

Appeal from a judgment in a 42 U.S.C § 1983 action following a two-day jury trial in the United States District Court for the District of Vermont, Albert W.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Coffrin, *Judge*, finding that appellant impermissibly infringed appellees' constitutional right to equal protection, and from a damage award of $39,375 after a second trial solely on damages. Cross-appeals from the district court's order granting the second trial on damages and from a denial of costs and attorneys' fees. Judgment reversed because of insufficiency of evidence to support finding in favor of appellees.

MITCHELL J. SIKORA, Assistant Attorney General, Commonwealth of Massachusetts (Gerald J. Caruso, Assistant Attorney General, of counsel), *for Appellant-Cross-Appellee.*

PETER F. LANGROCK, Middlebury, Vermont (Susan F. Humphrey, Langrock, Sperry, Parker & Stahl, Middlebury, Vermont, of counsel), *for Appellees-Cross-Appellants.*

OAKES, *Circuit Judge:*

A dairy farm inspector employed by the Commonwealth of Massachusetts, William Saunders, appeals from an adverse judgment in an action under 42 U.S.C. § 1983 alleging a violation of equal protection of the laws, brought by appellees Harmasse ("Red") and Elizabeth LeClair, owners of a Vermont dairy farm. Following a two-day jury trial in the United States District Court for the District of Vermont, before

Albert W. Coffrin, Judge, the jury returned a verdict for the LeClairs and awarded damages of $44,152. The district court subsequently ordered a partial new trial on the damages, which produced a lesser award of $39,375. Saunders appeals from the original verdict and from the second damage award. The LeClairs cross-appeal from the court's original order for a partial new trial on the damages and from denial of costs and attorneys' fees. Because the evidence was insufficient to support a finding of a violation of equal protection, we reverse.

FACTS

Massachusetts requires that all dairy farms shipping milk into and within the Commonwealth pass an annual inspection to guarantee sanitary conditions. To this end, the Commonwealth employs a group of inspectors that covers New England and upper New York state. In the mid-1960s, Massachusetts adopted a policy designed to upgrade the quality of farm water supplies. A 1965 memorandum from the director of the Division of Dairying and Animal Husbandry noted that filtration and chlorination of such supplies was acceptable only when there was "*NO* other practical solution." Even if "an individual farmer may have to develop a new source of supply of water," that would still remain a practical solution "unless there is *NO* other reasonable alternative." In 1967, the Massachusetts Milk Regulation Board promulgated regulations to govern farm inspections that required farm water supplies to be "easily accessible, adequate, and of a safe sanitary quality," so as to assure safe water for cleansing milk storage tanks and utensils. Only water supplies coming from munici-

pal systems or covered and protected private supplies such as deep wells were mentioned as acceptable under the regulation. Because many farmers had only unprotected water sources, and because conversion to approved water sources was in some cases costly or infeasible, the policy was only gradually enforced.

Appellees own a 235-acre, 50-cow dairy farm in Charlotte, Vermont, which appellant had been inspecting since around 1950. By 1975, out of the 1,200 farms within Saunders' territory, only 10 or 11 remained without an approved water source. These included the LeClair farm, which used an unprotected and sometimes visibly dirty open pond as the water supply to its milk room. Since adoption of the new policy around 1965, Saunders had suspended many farms for lack of satisfactory water supplies. This was true despite the fact that in the area it was often difficult to obtain water by drilling.

Beginning in 1971, Saunders wrote at least annually in his "Dairy Farm Inspection Reports" on the LeClair farm that they should "provide protected water supply for milk room," although he nevertheless continued to approve the farm for milk shipment to Massachusetts. During the April 9, 1975 inspection visit to the farm, Mr. LeClair told Saunders about an existing 600' deep drilled well, but stated that it probably had insufficient water to supply the milk room. Saunders urged Mr. LeClair to connect it, indicated that he was not approved for the following year, and said that another inspection would occur within a month. Saunders did not return until December 23, 1975, seven days before farm approval was needed to ship milk in 1976. He had heard from an H. P. Hood field inspector in the intervening months that Mr. LeClair had not hooked up

the well, although he had had a well-digger look at it. Saunders, upon confirming this for himself, disapproved the farm and left an inspection report stating: "provide a protected safe water supply for milk room use. No further delays allowed on this problem." Mr. LeClair, who had not been present during this inspection, subsequently received a letter on January 14, 1976 officially suspending his farm. The LeClairs' attorney then sent Saunders a letter in late February, suggesting that his clients had been the victim of inequitable treatment and requesting an immediate reinspection. Saunders, with another inspector, returned to the farm on March 12, 1976, gave it an unusually detailed inspection, and still declined to give approval. Since that time, the LeClairs have not shipped milk to Massachusetts and for all practical purposes are out of business.

DISCUSSION

This case is lodged in a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply. Appellees do not allege an unconstitutional state statute or regulation that impermissibly classifies dairy farms into different categories. If they had done so, such a claim would have almost certainly failed. Economic regulation concerned with public health is squarely within the state's police power, and any classification of water supplies and farms not wholly irrational thus would be proper. Moreover, equal protection does not require that all evils of the same genus be eradicated or none at all. *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 109-10 (1949). Instead appellees' charge boils

down to one of selective enforcement or prosecution by a state official pursuant to a lawful state regulation. The claim is that of the ten or eleven farms with unprotected water supplies only two were suspended and the one other than the LeClairs' was quickly reinstated.

The doctrine of immunity and the law of equal protection intersect in determining whether appellant is liable for damages in this § 1983 action. Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection. *United States v. Rickenbacker,* 309 F.2d 462 (2d Cir. 1962), *cert. denied,* 371 U.S. 962 (1963). So too is appellant entitled to some degree of qualified immunity as an executive official for acts performed in the course of official conduct. *Gomez v. Toledo,* 48 U.S.L.W. 4600, 4601 (U.S. May 27, 1980); *Scheuer v. Rhodes,* 416 U.S. 232, 247-48 (1974). Given his responsibilities as an inspector who makes decisions necessarily affecting the economic well-being of farmers, Saunders must have the confidence to "call them as he sees them," and therefore should be shielded, for reasonable mistakes, from damage actions brought by unhappy farmers. *See Wood v. Strickland,* 420 U.S. 308, 319-20 (1975). At the same time, whatever protection is provided should not extend to the point where Saunders may operate with unbridled discretion, approving or suspending farmers by whim or caprice. *Wood v. Strickland, supra,* describes the scope of immunity in the school context: an official

> is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took

> the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id. at 322. The Court there suggested an inquiry into whether the official

> has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Id. Wood appears to propose, then, a test containing two independent parts: did the official, with subjective or objective knowledge, violate a person's constitutional rights, or did the official act with malicious intent to injure the person in some "nonconstitutional" sense? We think the *Wood* standard of qualified immunity is appropriate for an official operating in appellant's capacity.

As suggested earlier, the case law dealing with § 1983 actions alleging selective treatment is sparse. In *Moss v. Hornig,* 314 F.2d 89 (2d Cir. 1963), the case perhaps most closely on point, Moss brought a § 1983 action against a state official for selectively enforcing Sunday business closing laws only against Moss. The court held that "[t]o show that unequal administration of a state statute offends the equal protection clause one must show an intentional or purposeful discrimination." *Id.* at 92; *see Snowden v. Hughes,* 321 U.S. 1, 8 (1944). But the bare bones of the phrase "intentional and purposeful discrimination" are an insufficient guide to judge liability in this context. Under appellees' suggested interpretation, if Saunders intended to

suspend the LeClairs, which he clearly did, and his purpose was to prevent them from shipping milk to Massachusetts, which it clearly was, then he would be guilty of discrimination. This result would be so overinclusive as to be unworkable, let alone unfair.

Although not precisely on point, cases involving the criminal defense of selective prosecution provide a useful analogy. In *United States v. Berrios,* 501 F.2d 1207 (2d Cir. 1974), the court held:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination."

Id. at 1211 (citations omitted); *see United States v. Kahl,* 583 F.2d 1351, 1353 (5th Cir. 1978); *United States v. Scott,* 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied,* 424 U.S. 955 (1976); *United States v. Ortega-Alvarez,* 506 F.2d 455, 458 (2d Cir. 1974) (per curiam), *cert. denied,* 421 U.S. 910 (1975).

Drawing from the above standards articulated in *Moss* and *Berrios* as well as from the immunity inquiry outlined in *Wood,* we believe that liability in the instant type of equal protection case should depend on proof that (1) the person, compared with others

similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.[1] *Cf. Moran v. Bench*, 353 F.2d 193, 194 (1st Cir.), *cert. denied*, 384 U.S. 906 (1965) (§ 1983 action brought against state motor vehicle officials involving suspension of a license) ("[I]f defendants employed their official powers for the purpose of injuring the plaintiff, rather than to serve the proper ends of their governmental duties, plaintiff might well have a claim under the civil rights statutes.")

In determining whether the evidence here was sufficient to survive a motion for directed verdict, we must decide whether the record as a whole would allow a reasonable jury to reach a verdict against the moving party. *Gehrhardt v. General Motors Corp.*, 581 F.2d 7, 14 (2d Cir. 1978); *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). On the record as a whole, we find that the LeClairs failed to prove an equal protection violation by Saunders adequate to survive a directed verdict.[2] In support of the "selective treat-

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1 We leave open the question whether an official who claims that his intent to injure was benign but which under any objective measure would not be found so may be held liable. For example, had Saunders testified that he fully intended to hurt the LeClairs but only because he thought Mr. LeClair would mature as a human being when faced with economic adversity, we would need to decide whether such subjective belief would insulate Saunders from a finding of malicious or bad faith intent.

2 It is quite clear that qualified immunity is irrelevant to the existence of a cause of action under § 1983, since it operates only as a defense available to the official in question. *Gomez v. Toledo*, 48 U.S.L.W. 4600, 4601 (U.S. May 27, 1980). However, on the basis of all the evidence here, Saunders' cloak of qualified immunity has not been pierced.

ment" prong of the test, the LeClairs presented evidence showing that their farm was excluded while ten or eleven others with similar types of unprotected water supplies were not. Although appellant maintains that appellees' well made their farm dissimilar from the others, the jury may have credited Mr. LeClair's testimony that the well was inadequate for milk room use—and thus not a viable alternative water source—and that he told Saunders it was a dry well.

But we need not decide whether appellees satisfied the first part of the test, since even assuming arguendo that they did, they nevertheless failed to proffer sufficient evidence supporting the second. The LeClairs never alleged that they were excluded because of their race, nationality, *cf. Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886), religion, or other invidious reasons, or to prevent them from exercising, for example, their First Amendment right of free speech or any other constitutional right. Appellees' claim, then, must rest on proof of Saunders' malicious or bad faith intent to injure the LeClairs through selective treatment of their farm. Although appellees alleged malice in their complaint, the evidence presented at trial does not support such a finding. Their evidence consisted of the following six elements: (1) that the other 10 or 11 farms were treated differently from the LeClairs'; (2) that Saunders wanted appellees to connect the well without knowing it was adequate; (3) that Saunders knew about the well in 1970 or 1971, but only suddenly in 1975 decided to push them to connect it; (4) that Saunders intentionally appeared at the end of 1975 so as to make it impossible for them to meet the deadline for approval; (5) that Saunders was in a spiteful mood at the time of the December, 1975 inspection because

he had had a run-in earlier in the day with another farmer; and (6) that the March, 1976 special reinspection was unusually meticulous and detailed.

None of the six elements directly shows malice, and each is too attenuated to provide adequate inferences of it. Taking the evidence in the light most favorable to appellees, and even viewing the six elements collectively, there was no showing that Saunders maliciously or in bad faith wanted to hurt appellees. The first two, the "different treatment" and "well might be inadequate" claims, do not in themselves show malice. Nor does the fact that Saunders waited until 1975 to exclude the LeClairs, since he had been warning them about the water supply problem since 1971; if anything this shows that he had been very lenient. And appellant hardly surprised the LeClairs by appearing at the end of the year in 1975. On his December, 1974 inspection report, Saunders had written "*Last Request.* Provide protected source of water for milk room use." In April, 1975, he told LeClair to connect up the drilled well, and although he indicated he would reinspect in one month, the very fact that he next appeared in December does not presumptively illustrate malice. Apparently a Hood milk inspector had told Saunders in the intervening months that appellees had not yet hooked up the well, so there was no reason for appellant to visit until the time to approve or disapprove came near.

The final two elements come closer to showing malice or bad faith, but are still insufficient. That Saunders was mad at another farmer several hours before the December, 1975 inspection does not prove malice toward Mr. LeClair himself. Whether the other farmer was treated fairly or not is not at issue in this case, except to the extent that it reflects on Saunders'

treatment of appellees. While the detailed inspection in March, 1976 by Saunders and another inspector was probably unusual in its rigor, and may show some antagonism toward Mr. LeClair following receipt of his lawyer's February letter, it does not show malice at the time of the original suspension in December.

As a general matter, Mr. LeClair testified that there had never been any anger between him and Saunders during their over 25 years of dealings. The regulations guiding farm inspectors suggested that unprotected sources were unsatisfactory, and that filtration and chlorination of such supplies, which Mr. LeClair apparently did at times, was acceptable only when there was "*NO* other practical solution." Saunders was clearly authorized, then, in his official capacity, to ensure compliance with these regulations by reporting offenders to his superiors. Even if the LeClairs did not have a well at all, Saunders would be able to move against them first among the remaining ten or eleven noncomplying farms without violating the equal protection clause. After all, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," as long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

As a general matter, the equal protection clause serves to protect suspect classes and fundamental interests against inequitable treatment, but other types of inequities and classifications may be justified by a showing of mere rationality. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). In this case, where no invidious discrimination or interference with the exercise of other express constitutional rights has

occurred, the malice/bad faith standard should be scrupulously met. If Saunders went after Mr. LeClair to *get him*, for any reason, then he should be liable. But we do not believe the evidence in this case can support such a conclusion.

Reversed.

Appendix—Order on Petition for Rehearing.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of September, one thousand nine hundred and eighty.

Docket Nos. 79-7113, 79-7759

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,
Appellees-Cross-Appellants,

vs.

WILLIAM SAUNDERS,
Appellant-Cross-Appellee.

Order on Petition for Rehearing

Appellees-cross-appellants Harmasse LeClair and Elizabeth LeClair have filed a petition for rehearing. The petition correctly states that the 1965 memorandum from the director of the Division of Dairying and Animal Husbandry mentioned at slip op. 4303 and referred to at slip op. 4312 was excluded from the evidence. Unfortunately Defendant's Exhibit L without indication that it was only for identification was printed in the appendix at A390 and we omitted to note the court's ruling excluding it contained just before the close of the defense case at A269. However, the omission from evidence of the 1965 memorandum does not affect the result in the case. The

1967 Massachusetts Milk Board's regulations governing farm inspections required farm water supplies to be "easily accessible, adequate and of a safe sanitary quality" so as to insure safe water for cleansing milk storage tanks and utensils. Properly covered and protected private supplies such as deep wells or springs were mentioned as acceptable in the explanation of the regulations as set forth in Defendant's Exhibit K which was admitted at the same time Exhibit L was excluded.

It is true that the same explanation is relied upon by appellees-cross-appellants on the basis that it states that "the quality of the water shall be determined by analysis of the State Board of Health of the state in which such water supply is located, or other qualified laboratory." They point out that in face in February of 1976 they did obtain a state water certificate in respect to their pond. But this does not indicate that the pond was "properly covered over and protected from all possible sources of contamination" as the explanation to regulation required. We read, and we think appellant Saunders could reasonably have read, the reference to certification of the quality of the water to relate to private supplies (including wells, springs, artesian wells, or other sources) "properly covered over and protected from all possible sources of contamination," not to open ponds. Thus the LeClairs' water supply was not acceptable under the regulations as interpreted in the explanation.

Accordingly, we amend the original opinion by omitting the fourth and fifth sentences from the first new paragraph on slip op. 4303 and revise the second sentence in the first full paragraph on slip op. 4312 to

read, "The regulations guiding farm inspectors with accompanying explanation were to the effect that unprotected and uncovered sources were unsatisfactory; while filtration and chlorination of such supplies had been permitted for a period of time in the past, Mr. LeClair had been repeatedly warned that his pond as a source for water supply to the milk room was unsatisfactory." Also, we insert the following sentence after the last complete sentence on slip op. 4312:

> As Judge Skelly Wright recently stated, "The key here is that the equal protection clause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case invoking the equal protection clause, if it is to succeed, must allege something more than a tort, personal to the plaintiff." Wright, J., *Judicial Review and the Equal Protection Clause,* 15 Harv. C.R.-C.L. L. Rev. 1, 27 (1980).

We have examined the other points made in the petition for rehearing and consider that they are answered in the original opinion.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman

/s/ JAMES L. OAKES
James L. Oakes

Circuit Judges

/s/ CHARLES H. TENNEY
Charles H. Tenney

District Judge

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of September, one thousand nine hundred and eighty.

Docket Nos. 79-7113, 79-7759

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,
Plaintiffs-Appellees/Cross-Appellants,

v.

WILLIAM SAUNDERS,
Defendant-Appellant/Cross-Appellee.

Order

A Petition for rehearing containing a suggestion that the action be reheard *en banc*, having been filed herein by counsel for the plaintiffs-appellees/cross-appellants Harmasse LeClair and Elizabeth LeClair, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ WILFRED FEINBERG
Chief Judge

Appendix—Amended Complaint.

UNITED STATES DISTRICT COURT

District of Vermont

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,

v.

WILLIAM SAUNDERS.

Civil Action Docket No. 76-94

Amended Complaint

This is a suit for money damages including punitive damages pursuant to 42 U.S.C. §1983. Jurisdiction of this cause is invoked pursuant of 28 U.S.C. §1343(3).

STATEMENT OF FACTS

1. Plaintiffs are citizens of the United States and are residents of Charlotte, in the County of Chittenden and State of Vermont.

2. Defendant is a citizen of the United States and a resident of New Haven, in the County of Addison and State of Vermont.

3. The Plaintiffs are engaged in the dairying business in Charlotte, Vermont.

4. The Defendant is employed as a milk inspector for the Commonwealth of Massachusetts Milk Regulation Board, Cambridge, Massachusetts.

5. The on or about the 20th day of January 1976 in his capacity as milk inspector for the Commonwealth of Massachusetts the Defendant suspended the Plaintiffs from shipping to Massachusetts the milk produced on their dairy.

6. That as a result of said suspension the Plaintiffs have lost their source of income; i.e. the sale of milk.

7. That the aforesaid suspension was initiated without a hearing.

STATEMENT OF CLAIM

8. Plaintiffs have expended and are obligated to continue to expend various sums of money in establishing and maintaining their dairy business. They have been prevented from shipping their milk to market and deprived of their source of income which they could have earned except by virtue of the action of the Defendant.

9. Defendant has violated Plaintiffs' civil rights in that he has:

A. Deprived Plaintiffs of their means of earning a living;

B. Denied the Plaintiffs equal protection of the laws;

C. Caused the Plaintiffs a loss of their reputation in their community.

10. That the Defendant, acting under the color of state law did arbitrarily, capriciously and maliciously deprive the Plaintiffs and each of them of the right guaranteed under the Constitution of the United States;

to wit, their right to the equal protection of the laws; their right to hold property and their right to due process.

WHEREFORE Plaintiffs demands that the actions of the Defendant, described above, be declared unlawful under the statutes of the United States and the United States Constitution and that actual damages of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) and punitive damages of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), together with costs and interest and attorneys' fees, be assessed against the Defendant and awarded to Plaintiffs.

Plaintiffs herein request a trial by jury.

DATED at Middlebury, in the County of Addison and State of Vermont this 23rd day of May, 1978.

LANGROCK SPERRY PARKER
and STAHL
By /s/ PETER F. LANGROCK
Peter F. Langrock, Esquire
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
For The
District of Vermont

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,
Plaintiffs,

vs.

WILLIAM SAUNDERS,
Defendant.

Civil Action No. 76-94

Amended Answer

The Defendant in the above-entitled action hereby answers the various allegations of the Complaint as follows:

STATEMENT OF FACTS

1-3) The allegations contained in Paragraphs 1 through 3 are admitted.

4) In answer to Paragraph 4 of the Complaint, the Defendant admits that he is employed as a milk inspector for the Commonwealth of Massachusetts Milk Regulation Board located at 100 Cambridge Street, Boston.

5) The Defendant denies the allegations contained in Paragraph 5 of the Complaint.

6) The Defendant lacks sufficient knowledge to form a belief as to the truth of the allegation contained in Paragraph 6 of the Complaint.

7) The allegation contained in Paragraph 7 of the Complaint constitutes a conclusion of law and requires no answer.

STATEMENT OF CLAIM

8) The Defendant lacks sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint.

9-10) The Defendant denies the allegations contained in Paragraphs 9 and 10 of the Complaint.

AFFIRMATIVE DEFENSE

Further answering, the Defendant says that at all times relevant to the present action he acted in his official capacity toward the Plaintiffs with good faith, and that, therefore, his actions were privileged and immune from liability.

Dated at Burlington, Vermont this 22nd day of June, 1978.

WILLIAM SAUNDERS
By His Attorneys

/s/ ROBERT J. PERRY
Robert J. Perry, Esquire
Perry & Schmucker
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/s/ MITCHELL J. SIKORA, JR.
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UNITED STATES DISTRICT COURT
For The
District of Vermont

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,

v.

WILLIAM SAUNDERS.

Civil Action File No. 76-94

Interrogatories

1. Did the defendant knowingly cause the plaintiffs to be suspended from shipping milk produced at their dairy into the Commonwealth of Massachusetts?

Answer: [x] (yes) [ ] (no)

(If your answer is "no," you need not answer any further questions; the foreman should also then sign the general verdict for the defendant.)

2. Did the defendant intentionally and purposefully discriminate against the plaintiffs?

Answer: [x] (yes) [ ] (no)

(If your answer is "no," you need not answer any further questions; the foreman should also then sign

the general verdict for the defendant. If your answer is "yes," you should go on to question 3.)

3. Was the defendant's intentional and purposeful discrimination a proximate cause of the injuries and consequent damages to the plaintiffs?

Answer: [x] (yes) [ ] (no)

(If your answer is "no," you need not answer any further questions; the foreman should also then sign the general verdict for the defendant. If your answer is "yes," you should go on to question 4.)

4. What amount of damages did the plaintiffs sustain?

$44,152

/s/ JAMES W. ABELL
Foreman

Rendered: June 22, 1978

Appendix—Verdict for Plaintiff.

UNITED STATES DISTRICT COURT
For The
District of Vermont

HARMASSE LeCLAIR and ELIZABETH LeCLAIR,

vs.

WILLIAM SAUNDERS.

Civil Action No. 76-94

Verdict for Plaintiff

In this cause, the Jury on their oath say that the defendant is liable on the issue of damages as the plaintiff has alleged and find for the plaintiff to recover from the defendant THIRTY-NINE THOUSAND THREE HUNDRED AND SEVENTY-FIVE Dollars, damages.

/s/ RONALD C. MURPHY
Foreman

Rendered: July 25, 1979

Massachusetts G.L. c. 94, §13

The milk regulation board established under section forty-two of chapter six shall, subject to the provisions of chapter thirty A, make rules and regulations establishing grades of milk, one of which shall be termed "Grade A", and regulating, and establishing standards for, the production, processing, labeling and sale of milk of such grades, including bacterial standards and sanitary standards for all grades of milk and fat standards and milk solids standards for grade A milk. The board may also by such rules and regulations establish any food or nutritional standards for special grades of milk and may specify how such special grades of milk shall be tested prior to being sold or delivered, or offered for sale or delivery. The board may from time to time amend any rule or regulation adopted under this section. No standard established by said board shall fall below the Massachusetts legal standards for milk, or any standard hereafter prescribed by law for milk of the same grade to which the standard established by the board relates.

Massachusetts G.L. c. 94, §16C

The director may issue a certificate of registration for a dairy farm which, upon inspection made by him within thirty days prior to the date of issuance of such certificate, clearly indicates satisfactory compliance with the requirements as to milk standards and dairy farm inspection established by the board under section thirteen of this chapter and section forty-two of chapter six. The certificates of registration for any given registration year shall be plainly distinguishable by color from those

issued during immediately preceding years. Each dairy farm registered by the director shall receive without cost a numbered certificate of registration which shall, while in effect, be posted in a conspicuous place at all times on said farm. Each certificate of registration shall expire on the following June thirtieth, if for a farm located within the commonwealth, and on the following December thirty-first, if for a farm located without the commonwealth, and an annual application for renewal thereof shall be made to the director not later than the preceding May thirty-first, in the first instance, and not later than the preceding November thirtieth, in the second instance, on forms furnished by the director. If a certificate of registration is lost, a duplicate copy may be obtained from the director upon written application and at a cost of fifty cents each. The director may also, from time to time, renew a certificate of registration; provided, that he has made, in the case of each renewal, at least one inspection of the dairy farm involved within one year prior thereto and has thereby determined that continuing compliance with the requirements of the board is being maintained. The director may accept, as a basis for the issuance or renewal of certificates of registration, the inspection reports of milk inspectors within the commonwealth with respect to farms within or without the commonwealth which have been inspected by them; provided, that such reports certify that such farms maintain compliance with said requirements.

Massachusetts G.L. c. 94, §16D

A certificate of registration for any dairy farm may be refused, or, if issued, may be suspended or revoked by the director for failure to maintain compliance with the requirements as to milk standards and dairy farm inspection established by the board; provided, that the director may in his discretion allow the parties concerned a period of not more than thirty days in which to achieve compliance with said requirments, such compliance to be determined by reinspection; and provided, further, that, if compliance with said requirements, such compliance to be determined by reinspection; and provided, further, that, if compliance has not been achieved at the end of thirty days, the operator of the dairy farm involved shall be entitled to a hearing before the director, or a person designated by him, prior to the final refusal, suspension or revocation of such certificate, such hearing to be held after reasonable notice specifying the day, hour and place thereof and accompanied by a statement of the alleged failure to comply, or the reasons for such refusal, suspension or revocation. The decision of the director may be appealed to the board, whose decision shall be final. A certificate of registration which has been suspended shall be plainly stamped:-"Suspended until _____ (date)"; and the operator of the dairy farm involved may make written application to the director for reinspection at the expiration of the period of suspension. A certificate of registration which has been revoked shall be plainly stamped;-"Revoked"; and the operator of the dairy farm involved may make written application to the director for reinspection only after a period of one year from the date of revocation has elapsed. Immediate

notice of suspension or revocation of the certificate of registration shall be given by the director to each dealer, receiving station or plant handling milk produced on the dairy farm involved, and to the board of health of each city or town where such milk is sold, offered or exposed for sale. In case of emergency, directly and immediately threatening the public, the commissioner of public health may suspend a certificate of registration, and shall notify the director forthwith of any such suspension. The provisions of this section, when pertinent, shall apply to temporary certificates of registration issued under section sixteen G and sixteen H.

No. 80-1025.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

HARMASSE LeCLAIR AND ELIZABETH LeCLAIR,
PETITIONERS,

v.

WILLIAM SAUNDERS,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Opinions Below.

The decision below is reported at 627 F.2d 606 (2d Cir. 1980) and accurately reproduced in the petitioners' jurisdictional statement at A1-A16.

Jurisdiction.

The petitioners have invoked the Court's discretionary jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

The case does not involve the facial validity of any statute or regulation, but rather a state official's exercise of discretionary authority under a concededly proper regulatory scheme.

Statement of the Case.

A synopsis of the case in the light most favorable to the petitioners appears in the decision of the Court of Appeals at 627 F.2d 606, 607-608. That summary is a more reliable statement of the case than the one proffered in the jurisdictional statement.[1]

Summary of Argument.

The petitioners do not present a substantial federal question. They contend that the Court of Appeals for the Second Circuit does not recognize a claim of selective law enforcement in violation of the Equal Protection Clause by means of chargeable or "objective" bad faith on the part of state officials; and that the circuit courts have divided over that issue (p. 3).

The contention is unfounded because in the present case the Court of Appeals did acknowledge the applicability of a standard of objective bad faith to selective enforcement claims pur-

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[1] In particular, at pages 10-11, petitioners' assertions 3, 4, 6, 7, and 8 are self-serving and should give way to the Court of Appeals' view of the trial record.

sued under 42 U.S.C. § 1983, but found the evidence at trial insufficient for that theory of recovery (pp. 3-6).

Further, the circuit courts are not divided upon that issue. None has rejected a rule of objective bad faith. While the Court of Appeals for the Second Circuit has not found the question necessary for any prior decisions, it has suggested its understanding and approval of such a standard for cases of sufficient evidence (pp. 7-9).

Argument.

The petitioners claim the presence of a significant question of equal protection doctrine dividing the circuits: whether a plaintiff in a 42 U.S.C. § 1983 money damages action alleging discriminatory selective enforcement of state regulatory law must show actual malice, or bad faith, on the part of a defendant state official. They contend that the Court of Appeals here demanded a showing of actual malice or bad faith and excused or ignored the role of those chargeable mentalities (jurisdictional statement at 11, 13-14, 18-19), and that such an approach diverges from the views of two other circuit courts. *Id.* at 16-17. For several reasons the asserted issue is artificial and unworthy of the Court's jurisdiction.

I. In a Personal § 1983 Damages Action of the Present Kind, the Law is Settled that a Defendant Official is Liable for Either Actual or Chargeable Bad Faith; the Court Below Correctly Consulted that Standard.

The present § 1983 lawsuit sought the exclusive remedy of damages against the defendant state dairy farm inspector for

his allegedly selective enforcement of sanitary water regulations against the plaintiff farm owners. Jurisdictional statement A18-A20 (amended complaint). In its analysis of governing doctrine, the Court of Appeals consequently discussed the rules of official immunity under § 1983 and of selective prosecution under the Equal Protection Clause. 627 F.2d at 608-610. On those pages its explication of the leading cases and its appraisal of the evidence demonstrate that it tested the record for sufficient evidence of both actual (subjective) and chargeable (objective) bad faith on the part of the inspector.

For the standard of liability of immunity under § 1983, it consulted the leading decisions of *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974), and *Wood* v. *Strickland*, 420 U.S. 308, 319-320 (1975), and quoted extensively from the relevant passages of *Wood*. See 627 F.2d at 609. It observed that

> "an official is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate . . . constitution rights . . .."

It added that *Wood* suggested an inquiry into whether a defendant official

> "has acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

The Court of Appeals concluded:

> *Wood* appears to propose, then, a test containing two independent parts: did the official, with subjective or ob-

> jective knowledge, violate a person's constitutional rights, or did the official act with malicious intent to injure the person in some "unconstitutional" sense? *We think the* Wood *standard of qualified immunity is appropriate for an official operating in appellant's capacity.* (Emphasis supplied.)

Id. at 609.

For a standard of liability under the plaintiff's equal protection theory, the Court looked to cases involving the criminal defense of selective prosecution as a "useful analogy" and concluded, in light of its decisions led by *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974), that a selective enforcement, equal protection claim should show (1) discriminatory treatment plus (2) bad faith or invidious motivation. The Court summed up:

> Drawing from the above standards articulated in *Moss* and *Berrios as well as from the immunity inquiry outlined in* Wood, we believe that liability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. (Footnote and citation omitted; emphasis supplied.)

627 F.2d at 609-610.

These passages demonstrate convincingly that the Court of Appeals had *Wood*'s objective component of liability in mind.[2]

Its treatment of the plaintiff's evidence under the directed verdict standard leads to the same conclusion. The farm owners at trial had advanced six factual hypotheses of malice or bad faith. In the Court's view:

> None of the six elements directly shows malice, and each is too attenuated to provide adequate inferences of it. Taking the evidence in the light most favorable to appellees, and even viewing the six elements collectively, there was no showing that Saunders maliciously or in bad faith wanted to hurt appellees.

627 F.2d at 610.

It is difficult to believe that the Court based this perception upon a one-eyed inspection of the record, examining closely for subjective malice but ignoring evidence of chargeable bad faith, reckless, or arbitrary behavior. The compelling explanation, in light of the Court's awareness of the *Wood* doctrine and the *Moran* decision, *supra* n.2, is that it found the evidence insufficient to warrant application of the objective bad faith standards.

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[2] At the end of the last quoted sentence, the Court cited *Moran* v. *Bench*, 353 F.2d 193, 194 (1st Cir.), *cert. denied*, 384 U.S. 906 (1965), a § 1983 damages action in which the Court of Appeals for the First Circuit applied an objective test for bad faith: "It does not appear that the defendant's acts were beyond their authority, or that their conduct was arbitrary or unreasonable."

Indeed, at one point in their jurisdictional statement, the petitioners seem to acknowledge that the Court of Appeals incorporated *Wood*'s objective bad faith standard. *Id.* at 14.

[3] Consequently in footnote 1, 627 F.2d at 610, the Court remarked, "We leave open the question whether an official who claims that his intent to in-

II. The Court of Appeals for the Second Circuit has not Rejected a Rule of Objective Bad Faith in Selective Prosecution Cases so as to Create a Split of Authority Among the Circuits.

The petitioners' appeal to the Court's discretionary jurisdiction rests upon the thesis that the circuit courts are presently divided in their definitions of unconstitutional selective prosecution. They cite decisions in the Fifth and Seventh Circuits for the proposition that both actual or chargeable bad faith enforcement of civil and criminal law may violate the Equal Protection Clause. Jurisdictional statement at 16-17.[4] They theorize that a different standard controls in the Second Circuit. *Id.* at 17-19. "The [c]ourt required actual malice for the maintenance of an action, and thus even if Saunders acted in objective bad faith under *Wood* v. *Strickland* standards, he would still obtain dismissal." *Id.* at 19.

The proposition is inaccurate. The Court of Appeals for the Second Circuit, as well as those in other circuits cited by petitioners,[5] has never held that chargeable bad faith is insufficient to make out a case of selective prosecution or selective enforcement of civil law.[6] It has not found the issue necessary to

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jure was benign but which under any objective measure would not be found so may be held liable." The Court would not have "left open" such an issue genuinely presented by the evidence.

[4] See *Hawkins* v. *Town of Shaw, Mississippi*, 461 F.2d 1171, 1172-1173 (5th Cir. 1972); *Sangmeister* v. *Woodard*, 565 F.2d 460, 467 (7th Cir. 1977); *Olshock* v. *Village of Skokie*, 541 F.2d 1254, 1260 (7th Cir. 1976); *United States* v. *Falk*, 479 F.2d 616, 624 (7th Cir. 1973); *Weisburg* v. *Powell*, 417 F.2d 388, 392 (7th Cir. 1969).

[5] Jurisdictional statement at 14-15.

[6] To the best of the respondent's research, no circuit court has taken such a position. Rather, as in the decisions cited in the jurisdictional statement at 14-15, the parties have presented, and the courts have decided, the question of actual intent.

the decision of any selective prosecution appeal and has expressly reserved judgment to an appropriate case. The major discussion to that effect appears in *Moss* v. *Hornig*, 314 F.2d 89 (2d Cir. 1963), in which Chief Judge Lumbard noted that the issue remained open whether a mentality short of invidious motives of race and religion or interference with constitutional rights — a motivation such as personal spite — would suffice to state a claim of selective prosecution.[7]

> We are not convinced that the [decision of *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962) dealing with alleged class-based discrimination] precludes our granting relief if a plaintiff can show that a state official purposefully discriminated against him. However, Moss has made no such showing.

Id. at 93.

The intimation that selective prosecution would lie in instances of personal animus suggests also that such individual bad motivation would extend to cases of reckless, high-handed, or arbitrarily official conduct and that proof would inevitably include circumstantial evidence. In *Moss* the plaintiff failed for lack of evidence, not lack of law. The same is true here. Thus the petitioners cannot reasonably argue that the Court of Appeals has set its face against a rule of objective bad faith. At best they can argue that it has not yet found it squarely necessary to adopt the rule. That circumstance does not constitute a conflict of doctrine between the circuits. Nor is it likely to be long-lived. Aside from the suggestiveness of *Moss*, the usual policies favoring objective standards of

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[7] In *Moss* the complainant store owner showed that a local prosecutor had enforced the Sunday closing law in his district on only two occasions over the period of a year.

culpability seem likely to control the definition of selective prosecution in the Second Circuit. As in rules of criminal and tort law, liability will not turn upon purely subjective intent, especially when such a mentality might be utterly unreasonable or misguided in the circumstances. In short, if the Court of Appeals has not already embraced the rule proposed by the petitioners, it seems destined to do so at the first appropriate occasion. In the present case, the Court's analysis made plain that the evidence at trial had not been sufficient to support a claim of objective bad faith. See 627 F.2d at 610 n.1.

Conclusion.

The present case turned upon the sufficiency of the evidence at trial. It does not present a substantial federal question of novelty, difficulty, or divided authority. Consequently the Court should deny the petition for certiorari.

Respectfully submitted,

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